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IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1982

NO. 82-6768

DEBORAH RENE FINNEY,

Appellant,

v

MICHIGAN DEPARTMENT OF SOCIAL SERVICES,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE
STATE OF MICHIGAN

MOTION OF APPELLEE MICHIGAN DEPARTMENT OF SOCIAL SERVICES TO DISMISS OR AFFIRM

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TABLE OF CONTENTS

	Page(s)
INDEX OF AUTHORITIES	ii-iii
QUESTIONS PRESENTED	iv
NATURE OF CASE AND STATUTES INVOLVED	1
MOTION TO DISMISS	6
MOTION TO AFFIRM	8
CONCLUSION	19
APPELLEE'S APPENDIX	
CERTIFICATE OF SERVICE	

INDEX OF AUTHORITIES

CASES

	Page(s)
Davis v Smith, 266 Ark 112; 583 SW2d 37 (1979)	11
Davis v Wechsler, 263 US 22 (1923)	9
Falk v Civil Service Commission, 57 Mich App 134, leave denied, 394 Mich 819 (1975)	8
Herndon v Georgia, 55 S Ct 794 (1935)	14
In the Interest of DLH, 198 Neb 444; 253 NW2d 283 (1977)	10
In the Interest of Lewis, ___Iowa___; 257 NW2d 505 (1977)	10,11
In the Interest of Morrison, 259 Iowa 301; 144 NW2d 97 (1966)	10
In the Interest of VAEYHD, ___Colo___; 605 P2d 916 (1980)	10
In the Matter of Anthony L 'CC', 48 AD2d 415; 370 NYS2d 219 (1975)	10
In the Matter of Carl & Annette N, 91 Misc 2d 738; 398 NYS2d 613 (1977)	10, 12
In the Matter of Keyes, 574 P2d 1026 (Okla, 1978)	10
In the Matter of the Neglect and Dependency of DT, 89 SD 590; 237 NW2d 166 (1975)	10
In the Matter of Sharpe, 68 Mich App 619 (1976)	8
In the Matter of Trapp, 593 SW2d 193 (Mo, 1980)	10
In re David, ___RI___; 427 A2d 785 (1981)	10, 12
In re Mathers, 371 Mich 516 (1963)	17, 18
In re Proceedings Concerning a Neglected Child, 130 Vt 525; 296 A2d 250 (1972)	11
In re Willilam L, 477 Pa 322; 383 A2d 1228 (1978)	10
Jankovich v Indiana Toll Road Commission, 85 S Ct 493 (1965)	7
Lassiter v Department of Social Services, 452 US 18; 101 S Ct 2153; 68 L Ed 2d 640 (1981)	13, 16
Lawrence v State Tax Commission, 286 US 276 (1932)	6
Lehman v Lycoming County Children's Services, 102 S Ct 3231 (1982)	17

INDEX OF AUTHORITIES (continued)

CASES	Page(s)
Lynch v New York, 293 ULS 52 (1934)	7
Mathews v Eldridge, 424 US 319 (1976)	6
Michigan v Long, 103 S Ct 3469 (1983)	6
New Mexico ex rel Health & Social Services Department v Natural Father, 93 NM 222; 598 P2d 1182 (1979)	10
People v Schoos, 15 Ill App 3d 964; 305 NE2d 560 (1973)	10
Sanchez v Texas Department of Human Resources, 581 SW2d 260 (Tex Civ App, 1979)	11
Santosky v Kramer, 102 S Ct 1388 (1982)	6
United States v Wurzbach, 280 US 396; 50 S Ct 167; 74 L Ed 508 (1930)	10
SECONDARY AUTHORITIES	
Coleman, Standards for Termination of Parental Rights, 26 Wayne L Rev 315, (1980)	11
Goldstein, Freud, & Solnit, Beyond the Best Interests of the Child, (Free Press ed 1973)	11
McGowan & Blumenthal, Children of Women Prisoners: A Forgotten Minority, The Female Offender 121 (1 Crites ed, Lexington Books ed 1978)	11
OTHER	
Duquette, Michigan Law Manual for Forster Care and Adoption, 166 (1981).	17
Lincoln, Judicial Considerations in Child Care Cases, 11 Wayne L Rev. 709, 714 (1965)	9
STATUTES AND COURT RULES INVOLVED	
MCLA 712A.2b; MSA 27.3178(598.2b)	4, 12, 13
MCLA 712A.19a(d); MSA 27.3178(598.19a)(d)	8, 9
MCLA 712A.11; MSA 27.3178(598.11)	14
JCR 1969 2	14, 15
APPENDIX	

QUESTIONS PRESENTED

I. DOES THE INSTANT APPEAL PRESENT A FEDERAL QUESTION?

II. ASSUMING ARGUENDO THAT A FEDERAL QUESTION IS PRESENTED, ARE THE QUESTIONS PRESENTED SUBSTANTIAL?

IN THE SUPREME COURT

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NO. 82-6768

DEBORAH RENE FINNEY,

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v

MICHIGAN DEPARTMENT OF SOCIAL SERVICES,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN

THE NATURE OF THE CASE AND THE STATE STATUTE INVOLVED

Taurus Finney was born on March 17, 1978 to Appellant Deborah Finney, who had been convicted of several felonies on separate dates: (1) carrying a concealed weapon, (2) attempted possession of heroin, and (3) delivery of heroin. 415 Mich 512 at 553.

Appellant was imprisoned in the Huron Valley Correctional Facility. Id. While in prison, Appellant accumulated 23 major misconduct convictions involving insolence, disobedience, threatening behavior, theft and assault.

At the time of trial, Appellant's first "out date" was March 23, 1985.

Appellant had been incarcerated since October of 1976, but subsequently escaped and remained at large for three months. 415 Mich 512 at 553. During that time Appellant had intercourse with one Martin Cowen, also a prisoner convicted of possession of heroin, who was in minimum security. Id. Taurus was born of this union. During this time, Appellant was married

to James Finney, whose whereabouts are unknown. Id.

Appellant has also given birth to two other children. Alayho was born June 22, 1968 and is cared for by his maternal great grandmother. Id. Aleka was born April 14, 1976 addicted to heroin or methadone, as was Appellant. Aleka has been cared for by Appellant's sister, Michelle Thomas, since birth. Id. Ms. Thomas has legal guardianship over that child. Id.

The Department of Social Services tried to help Appellant plan for Taurus. Id. When Appellant was 7-1/2 months pregrant, social workers met weekly with the expectant mother and visited with relatives, including Michelle Thomas, a sister, in an attempt to find someone willing to care for the baby. Id. Initially, this sister said she was unable to care for the child. Id. Later, she said she would be willing to take the baby if arragements were permanent. Id. Appellant incorrectly states in her brief that near the time Taurus was born, Michelle Thomas contacted the Department of Social Services to make arragements to pick up the child but the Department of Social Services informed her she could not have the baby. Appellant's Jurisdictional Statement, p 9. Michelle Thomas called the Department of Social Services three days after Taurus was born and informed them that she had decided to take the baby, but only on a permanent basis as she was "unwilling to give it to Martin or Deborah". 1b.
Appellant however would not agree to adoption. 415 Mich 512 at 553. Ms. Thomas never intended to pick Taurus up, as she indicated that "she was willing to wait until the legality had been resolved." 1b. Ms. Thomas has never filed a petition in the probate division seeking legal guradianship and nothing has been suggested or done by the mother to effectuate such a plan. 415 Mich 512 at 554.

Pursuant to an Amended Petition filed by the Department of Social Services,a termination trial was held on July 31, 1978. 75A-76A, 415 Mich 512 at 554.
At trial, Dr. Judith Kleinman, child psychiatrist, (3b-5b) testified that the most desirable plan would be a permanent placement as soon as possible. 9b

She testified that if a parent is not available to parent an infant, permanent adoption is preferable because "the optimal development in an infant through childhood is served by having consistent parents who are present over time so that the child can develop a sense of reliability and permanence." 7b-8b.

The Probate Court entered its Opinion and Order terminationg Appellant's parental rights on August 24, 1978. 41A-44A. The Court found that the material allegations of the petition had been substantiated; (42A) that Taurus was within the jurisdiction of the court under MCLA 712A.2(b)(1-2); MSA 27.3178 (598.2)b(1-2), and that it would be in the child's best interests to be placed under the permanent custody of the Court.

Mrs. Finney appealed to the Washtenaw County Circuit Court, which affirmed the determination of the probate court in the decision signed October 26, 1979. 415 Mich 512 at 554. Taurus remained in the care of the foster family with whome she was placed at age 10 days. On April 23, 1980 the Michigan Court of Appeals denied Deborah Finney's application for leave to appeal. Id. A delayed application was filed in the Michigan Supreme court and on October 3, 1980, the matter was remanded for an evidentiary hearing concerning the status of the Appellant, her sister, her husband, Taurus, the putative father and the placement alternatives available. Id. The Probate Judge was permitted to make a recommendation as to custody and placement. Id.

Following the evidentiary hearing held in January 1981, the Probate Judge stated that "it is the court's unqualified recommendation that Taurus should remain in the foster home and that adoption should be pursued." Id. Nevertheless, the Supreme Court granted leave and heard oral arguments. On July 7, 1982, the Supreme Court again remanded the case to the Probate Court for clarification and findings of fact concerning possible placement with the aunt. Id.

On remand, the Probate Court explicated its basis for assuming jurisdiction over Taurus, and found that Ms. Thomas' home was not suitable for either adoptive or long term temporary placement. 63-65A.

On December 23, 1982, the Michigan Supreme Court affirmed the lower court's decision by an equally divided Court. 415 Mich 512. While the members of the Court agreed that Appellant herself could not provide proper custody for Taurus, they disputed whether or not Taurus was "otherwise without proper custody" under MCLA 712A.2(b)(1); MSA 27.3178 (598.2)(b)(1), so as to bring the child within the jurisdiction of the probate Court. 415 Mich at 512.

The Justices for affirmance held that the State makes a prima facie case that a child is otherwise without proper custody under MCLA 712A.2(b)(1); MSA 27.3187 (598.2)(b)(1), where it is shown that the parents or persons in actual custodycannot provide proper custody and no other arrangements to provide proper custody have been made. 415 Mich at 512. Further, once it is shown that the parent cannot provide proper custody, the burden of introducing evidence shifts to the parents as to whether other arrangements for providing proper custody have been made. Id at 556. The court reasoned that placing this burden on the parent who asserts such an agreement avoids placing the Department of Social Services in the impossible position of having to show that such agreements do not exist, given that any number of such possible alternative arrangements might be asserted. Id. The Justices for affirmance, found no evidence to support the conclusion that Appellant and her sister had reached an agreement whereby her sister would take custody of Taurus. Id.

The Justices for reversal held that there was no showing that Taurus was without proper custody. Id. They would hold that affirmative proof of Appellant's refusal to consent (to her sister's conditions for taking custody of Taurus), is necessary. Id. Further, it was held that since the probate court did not have jurisdiction ab initio, it was not appropriate to consider whether the §19a(d) was constitutional. Id at 518.

The Michigan Supreme court did not make reference to any federal authority in its opinion.

Taurus remains in the custody of the foster family with whom she was initally placed as a 10 day old infant. 71A,52A-55A. Taurus' foster family reflects her biological background and she has prospered in their care. 12b-14b.

Her foster parents have expressed an interest in adopting her. 415 Mich 512 at 554. Taurus is now 5-1/2 years old and apparently starting elementary school this fall.[1]

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1. Appellee would object to Appellant's statement that she has been released from prison and maintains a home for her two older children as it has no basis in the record or Appellant's appendix.

MOTION TO DISMISS

I. THE UNITED STATES SUPREME COURT SHOULD DISMISS THE INSTANT APPEAL FOR WANT OF A FEDERAL QUESTION.

Earlier this year, the United States Supreme Court held that respect for the independence of State Courts, as well as avoidance of rendering advisory opinions, have been the cornerstone of the Supreme Court's refusal to decide cases where there is an adequate and independent state ground. Michigan v Long, 103 S Ct 3469 (1983). In Santosky v Kramer, 102 S Ct 1388 (1982), Justice Rehnquist wrote for the dissent, that "if ever there were an area in which federal courts should heed the admonition of Justice Holmes that "a page of history is worth a volume of logic," it is in the area of domestic relations. This area has been left to the States from time immemorial, and not without good reason. Justice Rehnquist also wrote that "this is not to say that the Court should blink at clear constitutional violations in State Statutes, but rather that in this area, of all areas, "substantial weight must be given the good faith judgments of the individuals (administering a program)... that the procedures they have adopted assure fair consideration of the ... claims of individuals." Mathews v Eldridge, 424 US 319, 349, 96 (1976).

Appellant, in her jurisdictional statement, argues in effect that the Michigan Supreme Court blinked at clear constitutional violations by resting its decision on independent and adequate state grounds. In support for this proposition, Appellant cites Lawrence v State Tax Commission, 286 US 276, 282-83 (1932), and refers to some of her briefs below in an attempt to somehow make them part of the record. 77A-103A.

Appellant miscontrues the holding in Lawrence. See Appellant's

brief p 13. Properly stated, Lawrence held that when a constitutional claim is denied on nonfederal grounds, the Supreme Court will inquire whether the State Court's decision rests on a fair or substantial basis. Id at 282. The burden of proving that the state ground of the decision is inadequate is on the party invokving the jurisdiction of the Court. Jankovick v Indiana Toll Road Commission, 85 S Ct 493 (1965). Appellant has made no showing or assertion that the state grounds relied upon in the State Court are inadequate. Rather, she asks this Court to render an advisory opinion concerning a question of state law. Appellant-Petitioner has failed to meet her burden.

Further, in Lynch v New York, 293 US 52 (1934), it was held that a claim of jurisdiction cannot be sustained by reference to briefs and statements which are not part of the record. Mr. Chief Justice Hughes wrote "it is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State... but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgement as rendered could not have been given without deciding it." In the instant case, assuming arguendo that a federal question was properly presented, it is clear that a decision on the federal question was not necessary to the determination of the State Court.

Should the United States Supreme Court decide to accept jurisdiction and test the validity of the relevant State statutory provisions against Appellant's asserted constitutional claims, the result would be an advisory opinion.

MOTION TO AFFIRM

I. THE FEDERAL QUESTIONS RAISED ARE NOT SUBSTANTIAL.

A. APPELLANT'S PARENTAL RIGHTS WERE NOT TERMINATED UNDER MCLA 712A.19a(d); MSA 27.3178 (598.19a) (d).

Section 19a. reads in part:

> Sec. 19a. Where a child remains in foster care in the temporary custody of the court following the initial hearing provided by section 19. ..."

In the instant case, Taurus was initally placed in foster care pursuaNt to an emergency Ex Parte Placement Order, under which she remained when a petition for the termination of parental rights was filed. 71A-72A. Thus, since there had been no inital hearing placing Taurus in temporary custody within Sec. 19a., that section could not be used as a statutory basis for a termination hearing. Indeed, in In the Matter of Sharpe, 68 Mich App 619 (1976), the Michigan Court of Appeals held that the Probate Court's power to terminate parental rights is not limited to cases where a child has been placed in foster care in the "temporary" custody of the court. In the instant case, while Taurus was in emergency custody, termination was sought and based upon MCLA 712A.2b; MSA 27.3178 (598.2b). 72A, 75-76A. Appellant is seeking United States Supreme Court review of a statute (Sec. 19a(d)) which was not used to terminate Appellant's parental rights and which the Michigan Supreme Court did not review.

B. ASSUMING ARGUENDO THAT SEC. 19(a)(d) WAS USED TO TERMINATE APPELLANT'S PARENTAL RIGHTS, APPELLANT DID NOT PRESERVE HER CONSTITUTIONAL ARGUMENTS IN THE TRIAL COURT.

Appellant's constitutional attack on section 19a(d) was not preserved for appeal by either motion or objection in the lower court. "The principle is firmly established that even a constitutional question which has not been raised below will not be passed upon on appeal." Falk v Civil Service Commission, 57 Mich App 134 (1974). Since the Michigan Supreme Court affirmed the lower court's holding without deciding any

of the constitutional issues raised by Appellant, it may be inferred that those issues had not been properly preserved for appeal. It has been held that where local procedures are reasonable and nondiscriminatory towards the raising of federal claims, the United States Supreme Court will respect local procedural requirements. See Davis v Wechsler, 263 US 22 at 24-25 (1923).

The Supreme Court would be circumventing an established State procedural rule should it decide to hear this case on the merits.

C. SUBSECTION 19a(d) IS BOTH CONSTITUTIONAL ON IT'S FACE AND AS APPLIED.

Appellant argues the felony ground of subsection 19a(d) is impermissably vague because the state fails to give her fair notice of what conduct is proscribed. Presumably, Appellant could obtain the notice she desires through examination of the Michigan Penal Code. All behavior deemed felonious by the Legislature is described therein and Appellant can "guide her conduct" accordingly.

Appellant also argues the wording "of a nature as to prove the unfitness of the parent" is unconstitutionally vague and therefore violative of due process. (Appellant's brief, p 16). In essence, she questions what type of crime proves a parent's unfitness for the future custody of her child. Such a question reveals the flaw in her analysis. The felony grounds of 19a(d) consists of two elements: (1) the parent must be convicted of a felony and (2) the nature of the felony proves the parent's unfitness for future custody of her child. See Duquette, Michigan Law Manual for Foster Care and Adoption, 166 (1981).

Thus, it is not automatic; it requires a case-by-case examination of the surrounding facts and circumstances. There must be a nexus between the criminal behavior and the child to sustain the felony ground of subsection 19a(d). The appropriate question therefore, is not what crimes Appellant was convicted of, but whether the nature of the crimes prove her unfitness

for future custody. There is no disagreement that unfit parents should not have custody of their children. The dispute between Appellant and Appellee is whether the nature of the crimes of which she was convicted prove Appellant's unfitness. See, In the Matter of Anthony L'CC', 48 AD2d 415; 370 NYS2d 219, 222 (1975). A statute is not defective because there is a dispute about whether a given set of facts meet the statutory standard. United States v Wurzbach, 280 US 396; 50 S Ct 167; 74L Ed 508 (1930).

In the area of domestic relations, and particularly child abuse and neglect, the legislature has seen fit to draft laws which give the trained professional dealing with these matters on a daily basis, the opportunity to exercise discretion and yet stay within constitutional limits. State judiciaries have consistently found such legislation to be constitutional under a similar challenge as Appellant makes in the instant case. In the Interest of VAEYHD, ___Colo ___; 605 P2d 916 (1980) ("whose enviornment is injurious to his welfare"); People v Schoos, 15 Ill App 3d 964; 305 NE2d 560 (1973); In the Interest of Lewis, ___Iowa___; 257 NW2d 505 (1977); Interest of Morrison, 259 Iowa 301; 144 NW2d 9;7 (1966); In the Mater of Trapp, 593 SW2d 193 (Mo, 1980); In the Interest of DLH, 19;8 Neb 444; 253 NW2d 283 (1977); New Mexico ex rel Health & Social Services Department v Natural Father, 93 NM 222; 598 P2d 11182 (1979) ("other care or control," "mental incapacity"); In the Matter of Carl & Annette, N 91 Misc 2d 738; 398 NYS2d 613 (1977) ("failure to plan for the future of the child"); In the Matter of Keyes, 574 P2d 1026 (Okla, 1978)("care and protection necessary for the child's physical or mental health"); In re William L, 477 Pa Sluper Ct 322; 383 A2d 1228 91978) ("has caused the child to be without essential parental care, control, or subsistence necessary for his physical or mental well-being"); In re David, _____RE_____; 427 A2d 785 (1981) ("proper care and maintenance," "permanently neglected child"); In the Matter of the Neglect & Dependency of DT, 89 SD 590; 237 NW 2d 166

(1975) ("lacks proper parental care," "whose environment is injurious to his welfare," subjected him to mistreatment or abuse"); Sanchez v Texas, 525 SW2d 933 (Tex App 1975) ("conduct which endangers the physical or emotional well-being of the child"); In re Proceedings Concerning a Neglected Child, 130 Vt 525; 296 A2d 250 (1972).

Appellant further argues that "deprived of a normal home" is impermissably vague citing Davis v Smith, 583 SW2d 37 (Ark) (1979). The Davis court was mainly troubled by the multiple choice of definitions from which it was to choose one. 266 Ark at 121; 583 SW2d at 42. The imrisonment ground of subsection 19a(d) provides more guidance than the Arkansas statute. It is the parent's imprisonment that deprives the child of a normal home, thus "normal" should be construed in the context of parental absence or incapacity. See, Coleman, Standards for Termination of Parental Rights, 26 Wayne L Rev 315, 342 (1980); Cf McGowan & Blumenthal, Children of Woman Prisoners: A Forgotten Minority, in the Female Offender 121, (L Crites Ed, Lexington Books Ed 1978), p 124 (describes various barriers to an inmate's plans to reunite with her children). In this context it is difficult to the point of impossibility to describe "normal" with more precision. Whether a child will be deprived of a normal home for more than two years depends upon many variables. These include, inter alia, the child's age and developmental stage at the time of separation, length of separation, the nature and extent of the relationship with the parent, and the possibility of meaningful visitation after separation. See, generally, Goldstein, Freud & Solnit, Beyond the Best Interests of the Child (Free Press Ed 1973), p 99; Testimony of Judith Kleinmant, MD. Due process does not require more specificity than is reasonably possible under the circumstances. In the Interest of Lewis ___Iowa___; 257 NW2d 505, 510 (1977). What is a normal home in any given circumstance requires a factual analysis with consideration of the above variables. Based upon the foregoing reasons, subsection 19a(d) is not impermissably vague.

It is not necessary to delve into Appellant's argument concerning the uncertainty of actual time served because Appellant has already been incarcerated for longer than two years. "[W]hen a person's conduct thus falls squarely within the proscription of the statute...that person may not invoke the vagueness doctrine because the statute may not be definite in its application to others." In the Matter of Carl & Annett N, 91 Misc 2d 738; 398 NYS2d 613, 618 (1977). Accord, In re David, _____RI_____; 427 A2d 785, 800 (1981).

D. APPELLANT'S CONSTITUTIONAL ATTACK OF 712.A.2(b); MSA 27.3178 (598.2)(b), ASSUMES THE EXISTENCE OF FACTS CONTRARY TO THE LEGAL FINDING OF FACTS BY MICHIGAN SUPREME COURT.

Appellant's attack on the constitutionality of MCLA 2(b); MSA 27.3178 (589.2)(b) includes erroneous statements of fact. First, Appellant assumes there was an alternative placement for Taurus with her aunt. The Justices for affirmance specifically found that there was no evidence that Appellant and her sister had reached an agreement concerning custody of Taurus, and further that the conditions of Michelle Thomas for a permanent arrangement had not been met. 415 Mich 512 at 555-556. The Justices for reversal made the same finding when in Section VII of their opinion they conclude "If the mother and aunt can agree on the aunt taking custody of Taurus ... then there would appear to be no reason why the question of Taurus' custody could not be speedily resolved...". Id at 549. While arrangements were discussed between Appellant and her sister, there was never an agreement upon which the parties involved were compelled to act. Ms. Thomas never petitioned for legal guardianship of Taurus. Further the Department of Social Services made a home study of Ms. Thomas and found her home to be unsuitable for either adoptive or long term temporary placement. 64A.

Thus, for the reasons enumerated above, Appellant's "proposed placement" alternative was in reality unavailable. This was the legal conclusion of fact by the Michigan Supreme Court. This conclusion renders Appellant's argument moot.

Appellant's argument also represents a serious misunderstanding of Justice Coleman's opinion: it mistakes the burden of production for the burden of proof. Once the state proves the parent is unable to provide proper custody, "... the burden shifts to [the] parent to introduce evidence that other arrangements to provide proper custody have been made." The state must then prove, by clear and convincing evidence, that either the arrangements have not been made or that the plan is improper under MCLA 712A.2(b); MSA 27.3178(598.2)(b)

This is a reasonable distribution given the nature of the inquiry. A parent who has made an alternative child care plan is uniquely able to bring that plan to the attention of the Court. The parent need only offer evidence that such an agreement has been reached. This is within the ability of even the most limited parent.

A requirement that the state bear both the burden of production and the burden of proof is much more intrusive. The state would be forced to send its agents into the community to interview everyone with whom the parent might have made a child care plan and then subpoena those people to testify that no such plan exists. Surely this is an undersireable result.

Under Appellant's analysis, she need only "propose" an alternate arrangement for custody and the State would have its hands tied, unable to inquire into the child's welfare any further. If what Appellant argues became law, Taurus would have spent a very long time lying in the hospital in which she was born while Appellant and her sister argued over the conditions which each required before a transfer of custody could be accomplished.

Certainly the State of Michigan has an interest in neglected children sufficient to prevent such a scenario. See, Lassiter v Department of Social Services of Durham County, North Carolina, 452 US 18 (1981)

E. THE PROCEDURES THROUGH WHICH THE STATE ASSUMED CUSTODY OVER TAURUS DO NO VIOLATE DUE PROCESS.

(i) Appellant did not preserve her procedural claims.

Appellant's procedural claims were raised for the first time in her Supplemental Brief on Appeal filed October 2, 1981. 95A-103A. Neither the trial court, the circuit court, nor the court of appeals had an opportunity to address these issues. The Michigan Supreme Court did not address these issues. The principle is firmly established that even a constitutional question which has not been raised below will not be passed upon on appeal. Falk, supra.

The United States Supreme Court will look to state law in determining whether an issue has been raised in a timely manner. Herndon v Georgia, 55 S Ct 794 (1935). The principle enunciated in Falk is not designed to shield valid claims from judicial review but rather prevent errors of law which appellants may later characterize as miscarriages of justice. Had Appellant properly pled her constitutional and procedural claims before the trial court she might have prevailed and avoided 5-1/2 years of foster care for her daughter. However appellant now makes these claimes 5-1/2 years later asking this court to break a psychological bond between Taurus and her family which will cause Taurus permanent psycholigical trauma. 52A-55A. With this result in mind along with the holding in Herndon, this honorable court should not now grant an exception to such a long settled principle of law by reviewing Appellant's constitutional and procedural claims.

(ii) The DSS ex parte assumption of custody over Taurus did not violate due process. Under MCLA 712A.11 and JCR 2, the probate court can assume emergency custody of a neglected or abused child and set a subsequent hearing with notice to all relevant parties. JCR 2 reads in part:

> .1 If it shall be made to appear to the court upon filing of a duly sworn... petition..., together with such proofs as the court may require,

> that there are reasonable grounds to believe:
> (A) Conditions or surroundings under which the child is found are such as to endanger his health, morals, or welfare,...
> The court may immediately issue an order to the persons having custody or control of the child to appear at the time and place certain for a preliminary hearing as provided 4.2., and may endorse thereon an order that... person authorized by the court immediately take the child into custody... or effect temporary placement of such child pending such preliminary hearing.

A brief look at the ex parte order shows that emergency custody was taken by the DSS "pending hearing on April 3, 1977 at 11:00 a.m.", for which Appellant was given notice and did appear. 71A.

The state did not violate any of its own rules and Appellant was given notice and did appear for a full hearing of the matter. 104A-107A.

(iii) Appellant was not deprived of a right to counsel

The Probate Court judge read Appellant's letter into the record and indicated that he was granting her request. 104A-105A. The judge adjourned the hearing until April 10, 1978. 16b.
The judge, however, did take testimony merely to determine whether there was probable cause to continue the emergency placement order pending the continuation of the hearing adjourned until April 10 at Appellant's request. 104A-106A. Had the judge not done this, the emergency placement order would have been dissolved instanter, before a hearing on the matter had been held.

At the continuation of the hearing on April 10, 1978 Appellant appeared with her counsel, Kathryn Sedo. The judge informed Sedo:

> BARRIE: ...Ms. Sedo, you are aware, probably I think that we took some testimony last time for the purpose of establishing probable cause for a temporary placement.
>
> SEDO: I understand.
>
> BARRIE: And that is available to you if you haven't heard the tape and (sic) you want to hear it, you may do so.
>
> SEDO: Thank you.

Appellant never made any objections to the testimony taken on April 3,[1] 1978 and did not raise any constitutional claims concerning representation until her supplemental brief on appeal to the Michigan Supreme Court 5 years later.

Given that counsel for Appellant was present and able to object to every single word of testimony ever taken in this case, Appellant's constitutional right to counsel in this parental termination proceeding as defined by the "fundamental fairness" standard has not been violated.
See Lassiter, supra.

(iv) The DSS disclosed all material facts in their petition and Appellant received a fair trial.

At the preliminary hearing held April 10, 1978 the court became aware that Michelle Thomas had expressed an interest in taking custody of Taurus. 2b. The Court was informed by DSS that a home study was being done and that DSS was awaiting the results. 2b. Further, the amended petition filed July 20, 1978 contained Appellant's allegation that her sister was willing to care for the baby. 75A-76A.
At the termination trial held on July 31, 1978 all this information was before the court and Michelle Thomas offered extensive testimony concerning her position in this matter. 415 Mich 512 at 538-539.

At the time the ex parte emergency placement order was authorized, the DSS had received a phone call from Ms. Thomas stating her conditions for assuming custody and her intention to wait until the "legality had been resolved". 1b. She was not "available to care for the child", as Appellant states in her brief at page 33. This was the legal finding

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1. Appellant's statement that "At the subsequent hearing, Ms. Finney appeared with counsel, and denied the accuracy of the facts stated in the petition" is patently innaccurate and with out basis in the record. Appellant's brief at page 32.

of fact by the Michigan Supreme Court. 415 Mich 512 at 555-556. Appellant's claim that DSS withheld information from the Court is without merit when considered in light of the facts as they existed rather than as Appellant would prefer them to be.

F. THE CHILD'S INTEREST IN A PERMANENT HOME REQUIRES THAT APPELLANT'S APPEAL BE DISMISSED AND THE STATE COURT DECISION AFFIRMED.

The Court's decision on whether to take jurisdicion over the instant appeal must reach a balance between justice and finality. The interest in finality is at its strongest when a child's custody is at stake. Lehman v Lycoming County Children's Services, 102 S Ct 3231, 3238 (1982) The only obstacle between Taurus and foster parent adoption is Appellant's instant appeal. A decision to hear this case on the merits would be devasting. As stated in Lehman, "[t]here is little that can be a detrimental to a child's sound development as uncertainty over whether he is to remain in his current 'home' under the care of his parents or foster parents, especially when such uncertainty is prolonged." 102 S Ct at 3239

The trial court issued the order terminating Appellant's parental rights on August 24, 1978. Taurus was 4 months old. Appellant's Delayed Application for Leave to Appeal was filed with the Michigan supreme Court on May 9, 1980. Taurus was a little over two years old. The case was submitted October 13, 1981 and decided on December 23, 1982. Taurus is now 5-1/2 years old and apparently in school.

> [L]ong delays ... by... judicial process, have disasterous effect on the child's well-being. It can be argued that much of the trauma to little Paula Marie Mathers Furlong* was the result of the seven years which transpired before arriving at a final result. We cannot ask the children to carry such a burden.

Lincoln, Judicial Considerations in Child Care Cases, 11 Wayne L Rev 709, 714 (1965).

Injustice would result should this honorable court decide to hear

* In re Mathers, 37 Mich 516 (1963)

this case on the merits. It is unnecessary to speculate how long such a process might take. Even another day is too long for Taurus. As stated by Justice Coleman, Taurus "...is in danger of being severly hurt by the excessive duration of litigation leading to a permanent home." For this reason Appellee respectfully but vigorously urges this Court to dismiss Appellant's jurisdictional statement and affirm the decision reached by the Michigan Supreme Court. In re Mathers, 371 Mich 516 (1963)

CONCLUSION

For the reasons stated herein, this appeal should be either dismissed or affirmed.

Respectfully submitted,

WILLIAM F. DELHEY
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Post Office Box 8645
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Counsel for Appellee
Michigan Department of Social Services

DATED: October 6, 1983

TABLE OF CONTENTS FOR APPENDIX

Page(s)

1. DSS Worker's Telephone Notes of March 20, 1978 conversation with Michelle Thomas 1b

2. Excerpt of Transcript from April 10, 1978 Preliminary Hearing 2b

3. Excerpts of Transcript from Termination Trial Proceeding July 31, 1978 .....3b

   Dr. Judith Kleinman

   Direct Examination by Appellee's Attorney 3b-5b

   Cross Examination by Guardian Ad Litem 6b-8b

   Examination by Judge 9b

   Cross Examination by Putative Father's Attorney.....10b-11b

   Carolyn Ehrlich

   Direct Examination by Appellee's Attorney 12b

4. Evaluation of Taurus Finney by Kathleen Coulborn Fuller, November 18, 1980.....13b-14b

5. Referee's Report and Recommendations, and Order of the Court, April 3, 1978.....15b-16b

home from work at 4:30

-3-20 PC to Michele Thomas 542-7697
resides in Oakland Co.
→ Could she adopt Mika in this county
She has decided to take the baby (the weekend - it was named after her)
She wants to keep it permanently because she would be unwilling to give it to Kathy or to Deborah & She is willing to wait until the legality has been resolved
Michele has been off ADC for 1 year —
She works for Ford's - Rouge assembly
She receives $145 every two weeks for Mika's babysitting costs

3-20 PC to Mary Taylor
She will be able to care for the child.
Told her that I would call Mon.
re: that it appeared that the child would go into foster care on Monday

16

BARRIE: Mr. Theifels can we hear from you on this? Are you aware of the situation, and can you confirm that a home study is being done.

THIEFELS: Again I would like to defer to Mary Fransen, if you don't mind your honor?

FRANSEN: Yes, we are aware of that situation and we have requested Oakland County Department of Social Services to conduct a home study, and a they are in the process of doing that, and we are awaiting a report from them.

SEDO: I spoke before the hearing with Mr. Sacks, and Mr. Duquette, and um, at that time we talked about possibly adjourning this proceedi for three weeks so we can get the report on the home study. We al talked about the possibilities of setting a trial date some time in June assuming that we would need that.

BARRIE: Is there any objection, I'll start with the Guardian, is there any objection?

RIDELLA: I have no objection.

SACKS: I have no objection.

BARRIE: Can you give me a trial date in June, please. Ms. Sedo, you are aware, probably I think that we took some testimony last time for the purpose of establishing probable cause for a temporary placement.

SEDO: I understand.

BARRIE: And that is available to you if you haven't heard the tape and you want to hear it, you may do so.

SEDO: Thank you.

BARRIE: The testimony is sort of outlined in the last order. I prop then to authorize the filing of the petition and adjourn the matt until June.

26

* * *

DIRECT EXAMINATION OF DR. JUDITH KLEINMAN BY MS. SUSAN CARLSON. SWORN IN.

Q What is your name and profession?

A I am Judith Kleinman. I am a psychiatrist.

Q Are you licensed to practice psychiatry in this state?

A Yes, I am.

Q When were you licensed?

A Three years ago. That would make it 1975.

Q Okay. What is your occupational background?

A I got a Doctor of Medicine Degree from the University of Rochester in 1969; I did an internship in pediatrics in Pittsburgh and then a general psychiatry residency at the University of Colorado; and had been finishing up a fellowship in child psychiatry here in Ann Arbor since 1975.

Q Okay. Are you board certified or board eligible?

A Board eligible.

Q What does that mean?

A That means that I have the training to be certified as a general psychiatrist when I get around taking the board.

Q What hospitals are you associated with?

A The University of Michigan, Children's Psychiatric Hospital in particular.

Q And what positions do you hold there?

A At the hospital, I am a fellow and child psychiatry. I also am consultant to the child abuse and neglect team at the University of Michigan and outside of the hospital I have a private practice.

Q Do you have a speciality in...with...in the general speciality of child psychiatry?

A Not really. I am...They are interested in child development and in family dynamics.

Q Could you estimate the number of children that you see as patients or for evaluations in a month?

A Wow. Well, I see probably 15 to 20 hours of patients in a week. So in a month that would make it roughly 60 to 80.

Q What is the general age range of your patients?

A Well, it depends. The patients I am seeing in therapy are largely five and six on up to adolescents. In evaluations I frequently am asked to see younger infants in the family context.

Q Does your experience include the problems associated with attachment to a parent who INAUDIBLE authority in home environment?

A Well, in the sense that I am frequently asked to evaluate and consult on cases in which the question is being raised in an infant whether the home is adequate through my child abuse and neglect work. Yes.

MS. CARLSON: Your Honor, Dr. Kleinman qualifies as an ex- t witness and I move that her testimony be admitted as expert testimony.

JUDGE: Counsel.

MS. SEDO: I have no objection, Your Honor.

MR. WINTER: No objections, your Honor.

MR. RIDELLA: I have no objection.

JUDGE: You may proceed.

DIRECT EXAMINATION OF DR. JUDITH KLEINMAN BY MS. SUSAN CARLSON CONTINUED.

Q Could you please describe the attachment process of an infant's first year of life?

A Yes. Attachment process is to...is sort of a INAUDIBLE word that refers to usually the one person in an infant's life who is psychologically the most important. And it's roots start really from the day of birth. But it becomes a prominent developmental process starting around five to six months of age. Peaking at eight to ten months of age. And then continuing on in it's resolution really several years after that. What it involves is an infant gradually becoming aware of one other person who is specific, who is loving and caring, who is present over time, who is reliable; and to begin to rely on this person emotionally for meeting the infant's needs. Psychologically, that is important because it provides the basis not only for the infant's beginning sense of himself as a worthwhile person, but also as a beginning root of relationships with other people, both in terms of seeing other people as real and separate from himself—this evolves over several years--and in handling the feelings about other people the mixture of love and anger that we all have about other important people in our lives. And to begin to trust and rely on other people.

Q You mentioned that the process continued for a number of years.

custody.

A The difference is really in the time...well, two things. One there is the difference between visiting and having care of a child for several hours every day. The other difference is the time framework is very different for an infant. between seeing an infant day and seeing an infant every week or every few weeks.

Q Okay. You said that a critical time for adoption is five months of age.

A I said a critical time for attachment begins at five months. Therefore optimum time for adoption is prior to that time.

Q So the child is five months...If the child we are speaking of is five months old and has already reached the optimum age for adoption?

A Well, yeah. It has reached the age where it becomes more difficult then traumatic from now on to switch.

Q Okay. Any kind of change;at this point if the child is five months old any kind of change is going to be of equal difficulty.

A Any change would be difficult now. Over time whether it is equal or not depends on how many other changes are down the road and what the quality of home is that the child is going to.

Q Okay. Let me put that question little differently. Let us assume at the age of one..the child is five months old now and at the age of one adoptive parents are found. Let us also assume at the age of one either or both of the parents are now available to take physical custody of the child. Is the change going to be any more or less traumatic going to adoptive parents as opposed to the real parents.

A Well the trauma of the change at that age would be the same. The differences would be if there were differences between the homes looking at it from the child's point of view.

with a relative who has already taken care of a sibling or it is go to stay in foster care and be placed for adoption. Which of those two is more preferable?

A I think that would depend on...

Q Or neither?

A ...well, I think that would depend on the weighing of the alternatives. One, how likely it is the child would be adopted and the other is what the relatives is like, what this relative is like as a caring, mothering, parenting person.

Q Can you answer that in the abstract?

A No.

Q Alright. Then you cannot give any opinion as to which of those situations more desirable?

A Which ever one would lead to the most INAUDIBLE consistent caring would be the most desirable, and beyond that I really can't answer not evaluating the people.

Q Which you take the position that if attachment with parent can not be ...cannot occur parental rights should be terminated and the child not be allowed to have any contact with those parents.

A I think that depends on the age. Generally it is my opinion...

Q Say a five month old child.

A ...in an infant that the optimal thing is if the parent cannot provide adequate parenting that adoption is preferable, and that visitation provides confusion rather than is constructive.

Q So you would take...so you would take the absolute position that if visitation is available the parenting is not available that parental rights should be terminated?

A You are pushing me to hard and fast answers that I am not sure I can

make in this position. But I think in general...

Q Would you...well, would you take that absolute position.

A It is my general opinion that if parenting is not available that it is best to put the child...if an infant in a home where the parents will be seen as parents and the child will not have contact with the other parents.

Q We obviously have the fact situation in this trial now in which parents cannot be parents at the present time. However, contact with the parents is available. We have on the other hand the possibility of adoption and a choice has to be made between the two. As a psychiatris how would you make this choice between the two?

A My choice looking at the optimal development of the child would be that a permanent adoption would be preferable unless it was so unlikely that you were in fact talking about a series of foster homes.

Q Why would permanent adoption preferable?

A Because the optimal development in an infant through childhood is served by having consistent parents who are present over time so the child can develop a sense of reliability and permanence.

Q I am not sure what you mean by consistent parents. If I and...If I were married both and I and my wife worked and we were out of the house and we had a full time babysitter would we be providing consistent caring for that...for that child?

A You might well be if you were there and had good quality time in the evenings. You would be consistent over time as people who were there and cared for the child if the babysitters came and went.

Q How much would that differ from...from the child visiting their mother once a week and visiting their father whatever intervals was appropriate Until such time either one of them could take actual physical

things a minute ago and I agreed that if the child goes anywhere but the foster home now that there will be an effect probably since he is reaching the vulnerable period of attachment. And we agreed that six months from now if the child had been in the foster home this whole time that a change would have definite impact. Whether a change right now how traumatic that would be is...you are getting to the vulnerable point but the longer it waits the more traumatic it will be.

CROSS EXAMINATION OF DR. JUDITH KLEINMAN BY MR. DAVID WINTER CONTINUED

Q But it can be...the situation can...may be not be the remedy completely but there can be some sort of therapy given at working with the parents and...

A The best therapy and healing comes from going to a consistent, loving, caring, committed home.

MR. WINTER: No further questions.

JUDGE: Further cross examination.

MS. SEDO: I have no further...

JUDGE: Mr. Ridella, you have had your cross examination.

MR. RIDELLA: Yes.

JUDGE: Redirect

MS. CARLSON: No.

JUDGE: Alright.

QUESTIONING OF DR. JUTIH KLEINMAN BY JUDGE O'BRIEN.

Q Take the INAUDIBLE of your testimony is the most desirable thing is to place the child in permanent hands as soon as possible.

A Yes.

Q Whether it is adoptive or with parents.

A Yes.

JUDGE: Alright. That's all. Thank you.

A Again you are coming back to the question about prognosis. I know of no therapy that will take away the impact. One...and one can't do therapy with a one year old very well anyway. You can work with the parents and you can try to minimize the effect to maximize the healing that occurs, but the impact usually in my experience remains on the child's sense of himself and on relationships with important people.

Q But if the parents are willing to establish this sense of self-relationship between the two can't that overcome the traumatic experience...

A Well, again you are getting a bit into hazy zones where predicability is not hard and fast but in general it has been my experience that... like in so much else of human development there is an optimum time for this to occur and you can't just make it up later. You can make some constructive impact but it is in an infant that the six to twelve months old period seems to be the time that this optimally occurs and if it doesn't occur than you can't go back and just make it up.

Q I...I understand that but we have already established that no matter what happens in this situation right now this child has missed this period. But...

MS. CARLSON: Objection. We have not established that.

MR. WINTER: I thought she said that there would be either way whether the child was adopted or...

JUDGE: Your statement again was what?

MR. WINTER: That in the event either way whether the child is adopted or the child goes to its natural parents that this period of..what do you call "optimum."

DR. KLEINMAN: Attachment.

MR. WINTER: Attachment that will occur or that won't occur.

DR. KLEINMAN: Well, we have discussed several different

A Right.

Q ...have either they attach to one or two or they don't attach to anybody at all. Is that what you are saying?

A If there has been people who have done most of the care over this vulnerable period of time. Yes.

Q Okay. So then this have to happened in your studies and your field as...as a doctor of pediatrics, you must have seen this happened a number of times.

A Actually not very often in that most of the hospitals that I have been in children don't remain that long and as I have said the nursing situation is such that in fact it changes so frequently that there isn't usual one primary person.

Q In your studies, have you ever read of a situation that has occurred lets say by hospitalization?

A I don't think of any hospitalization per say but there are very analogous type of situations.

Q What I am trying to get at...what I am trying to get at is that there must be some sort of therapy that hospitals go through or that certain organizations have for that child upon release in that situation where they have thrown dependent on a nurse or a doctor?

A Actually, currently the way that problem is usually handled is that all attempts are made for the mother to be in the hospital as much as possible, to be the care taker so that there will be carry over when the child comes home.

Q Let's assume that the mother is not available; she is sick also.

A Yeah, then there would be a definite impact.

Q Then is there...is there therapy that can be...

A Yes. I can try anyway.

Q Well, I know that earlier in my opening statement I described Taurus but at this time let me ask you to.

A Okay. Taurus is a two and a half almost three year old, black child. Uh, she's a delightful little girl. She's small for her age. Uh, she smiles most of the time, has a very bright smile, big eyes. Uh, she's got a strong will, she will tend to ...to uh put up a fuss if something happens that does suit her quite right. She is sensitive if she gets her feelings hurt easily and will cry if they do. Uh, because she's such a small child and she's also very bright and alert that when she walks around and speaks, people tend to gravitate toward her because she's so cute, and they don't expect these big words coming out of this little tiny girl.

Q Are you familiar with her development?

A I've been able to follow it over the course of the time that I've been on the case and through my visits to the home.

Q Can you describe it to the court?

A Well, the development has been very normal in every respect. That is her...her physical development has met all of the typical developmental milestone. She sat up at the proper time. Around six or seven months was crawling. Uh, began to battle and say words around nine months, pulled up at appropriate times, was walking at thirteen months. Uh and now at two and half is toilette train and speaks well in sentences. So uh developmentally she has come along very well. She seems to be a happy child andthat she uh relates well to her foster family. She has had no major behavior problems that would indicate that she is not a healthy...you know not a happy child. She's been healthy with just minor kinds of medical problems.

Evaluation of Taurus Finney; by Kathleen C. Faller

Taura:

The family call Taurus Michelle, Taura. She is a bright, assertive child who appears very happy and active. She is quite verbal for a 2 1/2 year old and is already potty trained. She eats well, takes a nap every afternoon and appears to have a considerable sense of self esteem.

She is small in height for her age and the cause of this has recently been assessed at the University Hospital (Drs. Martha Spencer and Nancy Hopwood, Pediatric Endocrinology). Tests show that her growth hormone is half that for a child her age and that the problem is organic. However, recent measurements show a growth spurt. Therefore, they will wait one year before considering any intervention.

Parent-child interaction:

It was obvious that Taura felt very comfortable with her foster parents and as though she belonged to the Taylor family. Thus, initially when we arrived Taura eyed us in a playful way and hung between Mrs. Taylor's knees watching us. Later she sat in her foster mother's lap and then sat beside her on the couch. She brought in a large football (beachball size) to play on and elicited Mrs. Taylor's help in this endeavor. Mrs. Taylor was able to attend to Taura's needs and talk with us at the same time. She responded to Taura's demands with patience and equanimity. Mrs. Taylor also was aware of Taura's needs for care and control, and could set limits in a non confronting way.

It was clear that Mrs. Taylor got alot of pleasure out of Taura and enjoys having her around. Mr. Taylor has a good relationship with Taura as well. He is particularly concerned about her future.

Family interaction:

This is a relaxed and flexible family where there are limits but the capability to respond to individual needs. The Taylors are very caring of children, yet not possessive. Taura's relationship with Chopper and Anthony was briefly observed and seems a good one. Mrs. Taylor reports they get along well.

Impressions:

There is no doubt that the Taylors are Taura's psychological parents. They have cared for her since she was 10 days old, and she has known no other family. She has prospered in this environment and feels the security which is essential to her psychological growth and development.

a divorce, was at work from 5:00 A.M. to 4:15 P.M. and had difficulty with babysitters, and lived in an apartment with only two bedrooms, one of which already contained three children and would have four with Taura. Termination of parental rights was granted. However, the case is presently on appeal.

Taura was placed in the Taylor foster home at 10 days of age and has been there ever since. She is now 2 1/2 years old. Mrs. Taylor reports that Taura had three of four one-hour visits with Deborah a couple of years back and that Deborah did write. She also sent Taura a dress and the Christmas before last, she sent two piggy banks, one for Taura and one for Mrs. Taylor. The Taylors want to adopt Taura.

Family composition:

The Taylor family consists of Johnny and Mary Taylor, Chopper (Leonard) 14, Mrs. Taylor's son by a previous marriage, Tikka Gregory, 5, a longterm foster child, whose parents want to release her for adoption, Anthony Harrison, 3, a biracial child who was not wanted by his mother, and Taura, 2 1/2.

The Taylors are in the process of adopting Anthony and wish to adopt Tikka and Taura when this becomes possible.

Chopper is a bright, well adjusted adolescent who relates well and is involved in caring for the younger children.

Foster home status:

The Taylors have been licensed foster parents since 1975. In 1976 they became one of the two subsidized shelter homes for Washtenaw County; one is black, the Taylors, and one is white. Therefore in addition to the three children they have in a longterm basis, they take children temporarily on an emergency basis. Mrs. Taylor reports they have not had any shortterm placements for a month or so but sometimes they are busy. All of the reports on them done by the Department of Social Services indicate that this is an exemplary foster home.

Financial situation:

The Taylors live in an integrated working class neighborhood in Ypsilanti. Mr. Taylor works for Ford and has been there for some time. He usually leaves for work at 6:00 A.M. and returns about 3:30 P.M. He tries not to work overtime so that he can spend time with the family and help Mrs. Taylor with the children.

Mrs. Taylor worked as a welder at Chrysler for 7 years but quit to drive a school bus in 1975. Since they became one of the county's shelter homes, she does not work outside the home, but stays at home to care for the children and takes in some children for day care.

Referee's Report and Recommendation

Probate—Criminal 4007

State of Michigan,

The Probate Court for the County of WASHTENAW

In the Matter of the TAURAS FINNEY

At a session of said Court, held on the 3rd day of April A. D. 1978

Present, Hon. FRANCIS L. O'BRIEN, Judge of Probate.

REFEREE'S REPORT AND RECOMMENDATIONS:

PRESENT: Deborah Finney, mother
James Ridella, guardian ad litem
Donald Duquette, Supervising Attorney
Michael Sack, Student Attorney
Paul Thiefels, State Department of Social Services
Mary Fransen, State Department of Social Services
Ava Adler, court worker
Officer Rider, Washtenaw County Sheriff's Department
Officer Hulse, Washtenaw County Sheriff's Department

Preliminary hearing was held by the Referee on Petition 78-136, wherein the State Department of Social Services requests that the Court terminate the rights of the parents of the minor child. Testimony was taken from Mary Fransen, worker for the State Department of Social Services. She stated she has been in contact with the mother since January 1978; that the child was born on March 17, 1978 at Huron Valley Correctional Facility. Witness stated on information and belief that the mother has been incarcerated in prison on drug and weapon charges and will not be eligible for release before 1985; that the mother is still married to one James Crawford Finney, whose whereabouts are unknown, and that the biological father is one Martin Cowen aka Thaddeaus Russell who is incarcerated at Camp Cusino, Shingleton, Michigan and won't be eligible for release at least until May 1979. Witness stated that there are two other children in the family which are being taken care of by relatives, but they are not willing to take the above-named minor into their care.

The child's mother appeared with a written request for appointed counsel, and made no further statement.

Referee's Recommendations Concerning Findings and Disposition:

It is recommended that the filing of the petition be authorized.

It is further recommended that the Court find that the conditions or surroundings under which the child was found are such as to endanger his health, morals or welfare in that a prison for adults is not an appropriate place for the care and nurture of an infant; and that accordingly, the emergency placement of the child in temporary licensed foster care should be authorized and continued without prejudice to the rights of either parent. It is further recommended that counsel be appointed for the mother, that further hearing on the petition be held on Monday, April 10, 1978 at 2:00 in the afternoon and that notice of these proceedings be communicated by summons in the manner provided by law to James Crawford Finney and to Martin Cowen aka Thaddeus Russell.

Robert M. Barrie

ROBERT M. BARRIE
Referee

156

File No.

Order

ORDER OF THE COURT

The above recommendations are approved.

IT IS NOW THEREFORE ORDERED that the above-named minor child be placed under emergency custody of the court, in licensed foster home care, under the supervision of the State Department of Social Services, until further order of the court;

IT IS FURTHER ORDERED that the above-named minor is not be be removed from this placement without permission of the Juvenile Division of the Probate Court, until further order of the court;

IT IS FURTHER ORDERED that counsel be appointed for the mother, Deborah Finney;

IT IS FURTHER ORDERED that summons be issued to James Crawford and to Martin Cowen aka Thaddeus Russell;

IT IS FURTHER ORDERED that the State Department of Social Services be authorized to pay the expenses incurred in such placement;

IT IS FURTHER ORDERED that hearing be adjourned to Monday April 10, 1978 at 2:00 in the afternoon.

FRANCIS L. O'BRIEN
Judge of Probate
Juvenile Division

cmb

cc: SDSS
mother
Child Adv.
gal
court worker
counsel for mother

FILED

APR 3 1978

JUVENILE REGISTER

pm

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